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Supreme Court of the United States

October Term, 1975

No. 75-460

LARRY E. COTTEN, *et al.*,
Petitioners,

vs.

TREASURE LAKE, INC., and WESTINGHOUSE CREDIT CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

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Supreme Court of the United States

October Term, 1975
No. 75-460

LARRY E. COTTON, ROBERT F. BOOTH, BARBARA D. BOOTH, RITA JOYCE SMREKAR, PAUL and MARJORIE LABIK, HERMAN and OPAL I. BAKER,
Petitioners,

vs.

TREASURE LAKE, INC., and WESTINGHOUSE CREDIT CORPORATION,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

JOINT BRIEF FOR THE RESPONDENTS IN OPPOSITION

QUESTION PRESENTED

Is the District Court's refusal to certify a class action an appealable order pursuant to either 28 U.S.C. Section 1291 or 28 U.S.C. Section 1292(a)(1).

STATUTES AND RULE INVOLVED

28 U.S.C. 1291 provides:

> The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be held in the Supreme Court.

28 U.S.C. 1292(a) provides in pertinent part:

> The courts of appeals shall have jurisdiction of appeals from:
>
> (1) Interlocutory orders of the district court of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;
>
> * * * * *

Rule 23, Fed. R. Civ. P., provides in pertinent part:

> (a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the

class, and (4) the representative parties will fairly and adequately protect the interest of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the prerequisites of subdivision (a) are satisfied, and in addition:

* * * * *

(2) the party opposing the class has acted or refused to act on grounds generally applicable to the class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the class as a whole; * * *

(3) the court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination by Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

(1) As soon as practicable after the commencement of an action brought as a class action, the court shall determine by order whether it is to be so maintained. An order under this subdivision may be con-

ditional, and may be altered or amended before the decision on the merits.

* * * * *

RESPONDENTS' COUNTER-STATEMENT OF THE CASE

The within action was commenced on February 9, 1973, by Larry E. Cotten, Robert F. Booth, and Barbara D. Booth (husband and wife) and Rita Joyce Smreker as Plaintiffs on their own behalf and allegedly on behalf of all others similarly situated against Treasure Lake, Inc. and Westinghouse Credit Corp. as Defendants. Subsequently, Paul and Marjorie Labik, and Herman and Opal I. Baker intervened as Plaintiffs. The claims asserted in the Amended Complaint seek damages and rescission under the Federal Consumer Credit Protection Act and the Interstate Land Sales Act from and against both Defendants. The claim of rescission under the Federal Consumer Credit Protection Act was dismissed by Court Order, from which no appeal was taken. (See letter of Mack Cook II to Hon. Frank J. Battisti, dated August 14, 1974, App. "A".)

The Petitioners sought class certification of this action under Rule 23(b)(3), Federal Rules of Civil Procedure. After receipt of briefs and oral argument on Petitioners' first Motion for Class Certification, and the filing of an Amended Complaint and briefs in response to Petitioners' Second Motion for Class Certification, the trial court, on November 14, 1974, entered an Order denying class status in the within cause. (See Pet. App., pp. 28-29.) In this order, the trial court concluded that common questions of law and fact do not predominate in this action, and that it could not be held that a class action would be superior

to other methods available for a fair and efficient adjudication of the controversy. Having reached this conclusion, the trial court made no findings relative to the other criteria to be considered in determining class certification, as such other findings are of no significance in this situation.

An appeal was taken from this Order to the United States Court of Appeals for the Sixth Circuit. Respondents filed a Motion to Dismiss the appeal on the grounds that the Order of the District Court denying certification as a class action was not a final decision or an appealable order under 28 U.S.C. §1291. The Motion to Dismiss was considered by the Court and was denied without prejudice to renewal when the appeal was to be heard on its merits. (See, Pet. App., p. 23.)

Subsequently, the Court of Appeals heard arguments on the merits of the case and also on the Motion to Dismiss, which motion had been renewed. The Court of Appeals granted the Motion to Dismiss the appeal on the ground that the decision of the District Court was not final and hence was not an appealable order. (See, Pet. App., pp. 23-26.) The Court of Appeals concurred with the District Court that the action failed to satisfy the requirement of predominate questions of law or fact required by Rule 23, Federal Rules of Civil Procedure, and that the amounts of the typical claims of potential class members were enough to provide significant motivation for individual actions. In addition, the Court of Appeals also found that because of the amount of the claim of each of the named Plaintiffs, this case did not require consideration of the "death knell" rule.

Subsequently, the Petitioners filed a Petition for Rehearing by the Court of Appeals, which Petition was denied. (See, Pet. App., p. 27.)

ARGUMENT

A. The Class Action Determination Is Not Appealable Under 28 U.S.C. §1291 as a Final Order.

The denial of class action status has generally been regarded as a nonappealable interlocutory order:

> When a district court denies class action status for a lawsuit without disposing of the claims of the individual plaintiff, this denial is not an appealable final order under 28 U.S.C. §1291. . . . *Graci v. United States*, 472 F.2d 124, 126 (5th Cir. 1973).[1]

The only generally recognized exception to the foregoing rule is that of "death knell". This exception, first enunciated in *Eisen v. Carlisle and Jacquelin*, 370 F.2d 119 (2nd Cir. 1966), *cert. denied*, 386 U.S. 1035 (1967), has been applied only when

> the appellate court, considering the size of the individual plaintiff's claim, the extent of his financial resources, and the probable expense of his prosecuting a lawsuit to completion, determines the individual plaintiff cannot feasibly continue to litigate his claim alone. *Graci, supra*, at 126.

It can be seen that application of the "death knell" exception is a factual determination within the province of the district court. The district court in this case found that

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1. It should be noted that a review of the case law dealing with this point reveals that no Circuit Court of Appeals has held contra: See *Williams v. Mumford*, 511 F.2d 363 (D.C. Cir. 1975); *Korn v. Franchard Corp.*, 443 F.2d 1301 (2d Cir. 1971); *Siebert v. Great Northern Development Co.*, 494 F.2d 510 (5th Cir. 1974); *Walsh v. City of Detroit*, 412 F.2d 226 (6th Cir. 1969); *King v. Kansas City Southern Industries*, 479 F.2d 1259 (7th Cir. 1973); *Hartman v. Scott*, 488 F.2d 1215 (8th Cir. 1973); and *Weingartner v. Union Oil Co. of California*, 431 F.2d 26 (9th Cir. 1970).

"the damage claim still being pressed under the Truth in Lending Act does not demand class treatment, due to the special provisions of that act providing for the award of attorney's fees to successful plaintiffs", and "under the Interstate Land Sales Act, the typical claims of potential class members are in the range of several thousand dollars, certainly enough to provide significant motivation for individual actions." (Pet. App., p. 29.) Likewise, the United States Court of Appeals for the Sixth Circuit found that "because of the amount of the claim of each of the named plaintiffs this case does not require consideration of the 'death knell' rule. . . ." (Pet. App., p. 25.)

The "collateral order" doctrine of *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541 (1949) was not applied by the Sixth Circuit for the simple reason that it is not applicable here. In *Cohen*, the collateral right which was too important to be denied review was the statutory right of a defendant to require a plaintiff to post security for its payment of all expenses of the defense if unsuccessful as a condition of prosecuting the action. In contrast, there is no vested or absolute right to be representative of a class. Rule 23(b), Federal Rules of Civil Procedure, states: "An action *may* be maintained as a class action. . . ." (emphasis added), and provides a framework for such maintenance subject to the satisfaction of its requirements. Once those requirements are met, a class may be certified, not before. In addition, under Rule 23(c)(1), Federal Rules of Civil Procedure, a class action determination may be conditional, and may be altered or amended at any time before a decision on the merits. Clearly, a class action determination is not encompassed in the "collateral order" doctrine.

> The effect of the statute (28 U.S.C. §1291) is to disallow appeal from any decision which is tentative,

> informal or incomplete. Appeal gives the upper court a power of review, not one of intervention. So long as the matter remains open, unfinished or inconclusive, there may be no intrusion by appeal. *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 546 (1949).

The Sixth Circuit has clearly indicated that this matter remains open: "The order of the district court declining to certify the class may be fully reviewed in any appeal taken from a final judgment later entered in this case." (Pet. App., p. 26.)

Petitioners also contend that the District Court did not make the class determination as soon as practicable after commencement of the action as required by Rule 23 (c) (1), Federal Rules of Civil Procedure, pointing out that "the total of ninety-three (93) entries on the civil docket sheet of *Cotten* during this time period [February 9, 1973 to November 14, 1974] speaks for the lack of expeditious determination of the class aspect." It must be noted that "as soon as practicable" is a determination which, due to the individualness of each case filed in every court in this country, can be made only on a case by case basis. In the present case, Petitioners point out that this case began on February 9, 1973. (Pet., p. 19.) However, they fail to point out the fact that an Amended Complaint was filed on October 15, 1973; they fail to point out that in the interim they served defendants with two sets of interrogatories; they fail to point out that defendants filed a Motion to Dismiss for failure to state a claim on October 19, 1973; they fail to point out that on January 9, 1974, the District Court ordered the parties to submit full and comprehensive briefs on five issues relevant to a ruling on the Motion to Dismiss filed by the defendants; they fail to point out that a Second Application for Class Determination was filed on January 9, 1974; and they fail to point

out that the District Court's Memorandum Opinion and Order on the Motion to Dismiss was filed on August 8, 1974. In light of the foregoing, it is manifest that, considering the procedural complexity of this case, the District Court rendered its decision on class determination as expeditiously as possible.

B. The Class Action Determination Is Not Appealable Under 28 U.S.C. §1292(a)(1) as an Interlocutory Order Refusing Injunctive Relief.

Petitioners seek appealability under 28 U.S.C. §1292 (a) (1) contending that "[h]ad the class action been certified . . . an order commanding cancellation as to all affected lot purchasers could have been issued." (Pet., p. 11.) Although recognizing the factual difference, Petitioners cite *Brunson v. Board of Trustees of School District No. 1*, 311 F.2d 107, 108 (4th Cir. 1962), *cert. denied*, 373 U.S. 933 (1963), *Yaffe v. Bowers*, 454 F.2d 1362 (1st Cir. 1972), and *Price v. Lucky Stores, Inc.*, 501 F.2d 1177 (9th Cir. 1974) as being persuasive authority for their position. However, Petitioners have failed to recognize that the factual differences of these cases destroy their applicability to the case at bar. In *Brunson*, a class action was brought for injunctive relief against a school board which allegedly maintained a biracial school system; in *Yaffe*, a class action was brought against a city police chief for declaratory and injunctive relief; and in *Price*, a class action was brought for a violation of the Civil Rights Act of 1964, seeking injunctive relief. In each of these cases, certification of a class action was sought under Rule 23(b) (2), Federal Rules of Civil Procedure, which provides for a class action seeking injunctive or declaratory relief with respect to the class as a whole. In addition, it should be noted that an appeal was heard in *Yaffe* primarily due to the fact that the district court's decision was clearly erroneous in light

of the fact that the criteria of Rule 23(b) were applied cumulatively rather than alternatively. See *Yaffe, supra,* at 1366. Conversely, on the facts of the present case, it is quite clear that there is no basis for §1292(a)(1) appealability. As was found by the District Court, certification for the class was sought pursuant to Rule 23(b)(3). (See Pet. App., p. 28.) In addition, in Petitioner's Second Application for Determination and Order That This Action is to be Maintained as a Class Action certification was sought pursuant to Rule 23(b)(3) only. (See Second Application, p. 13.) The Petitioners, in their Amended Complaint, have not sought injunctive relief. The prayer contained therein seeks

(a) damages and relief according to the provisions of the Consumer Credit Protection Act;

(b) damages and relief according to the provisions of the Interstate Land Sales Act;

(c) such other damages and equitable or other relief as this court shall find and deem just and equitable;

(d) reasonable attorney's fees, cost and expenses, and interest in awards.

(See Amended Complaint, p. 22.) Accordingly, the inapplicability of 28 U.S.C. §1292(a)(1) is clear.

Assuming, *arguendo,* that the petitioners' prayer for "such other damages and equitable or other relief" is to be construed as a prayer for injunctive relief, there are still no grounds laid for §1292(a)(1) appealability. The District Court did not state that the claim for equitable relief had no merit, nor that it lacked jurisdiction to grant an injunction, nor even did it express any opinion as to whether injunctive relief was warranted at any particular

point in the proceedings. The District Court simply denied certification of a class action under Rule 23, a quite distinguishable action. In short, the denial of class action treatment in this case constituted neither issuance nor denial of any injunctive or equitable relief. As a result, petitioners have failed to bring this case within the ambit of 28 U.S.C. §1292(a)(1).

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit should be denied.

Respectfully submitted,

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APPENDIX A

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August 14, 1974

Honorable Frank J. Battisti
Chief Judge
United States District Court
Northern District of Ohio, E.D.
United States Court House
Cleveland, Ohio 44114

Re: Larry E. Cotten, et al

vs.

Treasure Lake, Inc., et al

Civil Action No. C73-144

Dear Judge Battisti:

The undersigned attorney and counsel for the Plaintiffs have read the MEMORANDUM OPINION AND ORDER of this Court filed and entered August 8, 1974.

This letter is addressed to that portion of the subject Order wherein this Court has ruled:

> "Plaintiffs failure to allege that a security interest was obtained in [Plaintiffs'] expected or present principal residences necessitates the dismissal without predjudice of [Plaintiffs'] equitable claims under the Truth in Lending Act." [p. 6]

After careful and full consideration of all aspects of the case; the claims, the defenses, the pendency of class

determination, the putative number of members in a Truth in Lending class [459] versus the number of members in an Interstate Land Sales class [459 plus 961 equal 1420], and perhaps most important of all, the evidence which would be presented at trial, we have concluded that we shall not now, on behalf of the Plaintiffs, submit a further amended complaint within the 15 days leave courteously granted by this Court.

This conclusion is also consistent with a statement made in the SECOND APPLICATION FOR DETERMINATION AND ORDER THAT THIS ACTION IS TO BE MAINTAINED AS A CLASS ACTION, filed January 9, 1974, to wit:

"As to Truth in Lending, each member of the class will have a claim as a matter of law against the Defendants, including damages under 15 USC §1640." [p. 5].

We shall now await the Defendants' response to Plaintiffs' class certification motion. Thereafter, it is our present intention to reply to the two issues set forth by the Court in the subject Order [p. 7].

Respectfully submitted,

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Carbon copies of this letter have been mailed to Marvin A. Sicherman and Thomas L. Kilbane, counsel for the Defendants.